

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA,

Plaintiff,

v.

TYSON FOODS, INC., *et al.*,

Defendants.

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Case No. 4:05-CV-329-GKF-PJC

**STATE OF OKLAHOMA’S MOTION IN LIMINE TO EXCLUDE
DEFENDANTS’ EXPERT REPORT ENTITLED “EVALUATION OF HYPOTHETICAL
REMEDATION STRATEGY PRESENTED IN STRATUS CONTINGENT VALUE
STUDY ILLINOIS RIVER WATERSHED” AND RELATED
TESTIMONY WITH INTEGRATED BRIEF IN SUPPORT**

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Plaintiff, the State of Oklahoma (“the State”), pursuant to Federal Rules of Evidence 104, 402, and 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), respectfully moves this Court for an order *in limine* excluding Defendants’ damages report entitled “Evaluation of Hypothetical Remediation Strategy Presented in Stratus Contingent Value Study Illinois River Watershed” dated March 2009, authored by John P. Connolly, Ph.D., Timothy J. Sullivan, Ph.D., and Frank Coale, Ph.D. (“Connolly Report”) (attached hereto as Exhibit A) and precluding the related expert testimony of Defendants’ testifying witnesses Drs. Connolly and Coale, pursuant to Rule 702 and *Daubert*, 509 U.S. at 589.

I. Introduction

The Connolly Report critiques the State’s contingent valuation (“CV”) survey and the validity of the results, concluding that the survey respondents should have been provided with more and different information relating to the alum treatment scenario presented in the survey. The Connolly Report is fundamentally flawed on two grounds. First, neither Dr. Connolly nor Dr. Coale, whom Defendants have identified as testifying experts relating to the Report, has any expertise in economics, contingent valuation, or survey methodology. Their opinions relating to the CV Study and resulting analysis are, therefore, of no value to the trier of fact. Second, even if the Court concludes that the authors are somehow qualified to render opinions about the validity of the survey or resulting analysis, the entire Connolly Report is based on a false premise. Specifically, the authors falsely assume that the alum treatment program in the survey scenario must be implementable, efficacious, and without so-called “collateral impacts.” These matters, however, are irrelevant to the validity of the survey evaluated in terms of survey respondents’ ability to value the accelerated future improvements in the Illinois River System and Tenkiller Lake. Accordingly, the testimony of Drs. Connolly and Coale should be precluded

for lack of relevant expertise, and the Connolly Report should be stricken for lack of relevance.

II. Factual Background

A. The CV Study

As the Court is aware, the State's team of internationally known experts in environmental economics, natural resource damage assessments, and survey methodology, led by Stratus Consulting, developed a survey that was administered to a large sample of Oklahoma residents. This work culminated in the State's expert report on damages entitled "Natural Resource Damages Associated with Aesthetic and Ecosystem Injuries to Oklahoma's Illinois River System and Tenkiller Lake" served on January 5, 2009 (hereinafter "CV Report"). (Dkt. #1853-5.) The CV Report provides – using the contingent valuation methodology – a measure of the monetary value placed on aesthetic and ecosystem injuries to the Illinois River system and Tenkiller Lake from 2009 to 2058 for the Illinois River system and from 2009 to 2068 for Tenkiller Lake.¹ The CV study, which was conducted over a more than two-year period, was undertaken within a framework of natural resource damage assessment ("NRDA") as set forth in the Department of the Interior's NRDA regulations (hereinafter "CV Study"). (See Dkt. #1853-5, CV Report, p. ES-1.) The CV Study was used to develop a conservative measure of these damages, by estimating the mean willingness-to-pay for an alum treatment program that would return the Illinois River system and Tenkiller Lake to their 1960 condition 40 years sooner than without the program (hereinafter "the scenario"). (*Id.*, p. 1-9.)

The CV Report described the survey's presentation of an alum program in this way:

The Solution: The solution introduced in the survey was a program to treat land and waters in the Illinois River watershed with alum, a substance that bonds with phosphorus and makes it unavailable to plants, including algae. The survey

¹ The State submitted a separate expert report addressing past damages – a report that is not specifically at issue here.

noted that many states have successfully used a similar program to reduce algae. ***The survey narrative explained that with alum treatments, it would take about 10 years for the river and 20 years for the lake to return to 1960 conditions, compared with 50 and 60 years, respectively, if alum was not applied. Hence, alum treatments would reduce the period over which the injuries would be present by 40 years for both the river and lake.*** Respondents were told that if alum treatments were implemented, the cost would be a one-time tax added to their state income tax bill next year.

The presentation of the alum treatment program allowed respondents to make a choice about a well-defined, realistic tradeoff. Either they could greatly reduce the injury and pay the tax for the alum treatments or accept the natural recovery without the alum treatment and use their money for other purposes. In Chapter 2 we discuss how tradeoffs of this type, which is the standard method used by economists, can be used to measure people's value for improvements to natural resources. ***While the State is not actually proposing this specific alum treatment program at this time, the choice was posed to the respondent as an actual choice. Posing choices in this manner is standard practice in CV surveys*** (Mitchell and Carson, 1989; Boyle, 2003).

(*Id.*, p. 1-7 [emphasis added].)

As stated in the CV Report, “[t]he presentation of the alum treatment program allowed respondents to make a choice about a well-defined, realistic tradeoff. Either they could greatly reduce the injury and pay the tax for the alum treatments or accept the natural recovery without the alum treatment and use their money for other purposes.” (*Id.*, p. 1-7.) “The key to the survey is that respondents accept that the outcome can be secured at a given cost to themselves. It is immaterial to the validity of the results whether the mechanism generating the outcome is fictitious as long as it is accepted by respondents.” (Ex. B, Hanemann Decl. ¶ 11.) “The validity of the respondents’ answers depends only on whether *they* [the respondents] found the alum treatments to be a plausible method for speeding up the recovery of the river and lake, not on whether such treatments would actually be carried out or would be effective if they were carried out.” (Ex. C, Tourangeau Decl. ¶ 7 [emphasis in original].) Furthermore, the CV Report clearly articulates the basis and objectives for the scenario, and nowhere does it suggest that the

proposed alum treatment program must be implementable, efficacious or without collateral impacts to arrive at a reliable damages estimate.

B. Defendants' Connolly Report

Responding to the State's CV Report, Defendants produced, among others, the Connolly Report, authored by Drs. Connolly, Coale, and Sullivan. As described more fully below, the Connolly Report criticizes the accuracy of and depth of information provided to the CV survey respondents. Based on their claimed inaccuracies and/or omissions, the authors go on to conclude that the CV survey is "not valid" and that the CV damages estimate is "meaningless." (Ex. A, p. 2.) Defendants have identified only Dr. Connolly and Dr. Coale as testifying experts. (Ex. D, 3/31/09 Letter from Theresa N. Hill to Richard T. Garren, p. 2.)

C. Dr. Connolly's Lack of Relevant Expertise

Defendants have identified Dr. Connolly as a testifying expert on Chapters 1-3 of the Connolly Report. (*Id.*) Dr. Connolly's own testimony aptly summarizes his lack of expertise in the areas that are relevant to the CV Report:

- **"I'm not an economist."** (Ex. E, Connolly 5/12/09 Depo Tr. at 183:2.)
- **"I'm not an expert on contingent valuation, and I'm not claiming to be one."** (*Id.* at 188:4-5.)
- **"I'm not a survey expert."** (*Id.* at 208:1.)

Although these admissions alone are sufficient for the Court to preclude Dr. Connolly from testifying on the CV Report, the State provides the following additional support.

1. Dr. Connolly Admits He Is Not an Expert in Economics.

In his deposition, Dr. Connolly repeatedly admitted that he is not an expert in economics. (Ex. E, Connolly 5/12/09 Depo Tr. at 8:13-15, 183:2.) He has no education (other than one undergraduate course), training, or professional experience in economics. (*Id.* at 7:17-8:3, 8:4-6,

183:2.) His only experience relating to economic practice or theory relates to his personal finances and the economics associated with his company. (*Id.* at 8:7-12.)

While criticizing the CV survey for the accuracy and/or lack of information presented to the respondents, Dr. Connolly admits that he does not know how economists handle the fact that people make economic decisions with imperfect information. (*Id.* at 16:25-17:3.) Nor does he know how economists, when analyzing revealed preference data or stated preference data, handle the issue of people making decisions with imperfect information. (*Id.* at 17:4-14.)

When asked what training he had in environmental economics to render an opinion on the validity of the CV Survey and damages estimate, Dr. Connolly testified that “[a]ll that’s needed here is common sense.”² (*Id.* at 53:12 [emphasis added].) He was unable to identify any economic training to support such an opinion. (*Id.* at 60:13-61:11.) He admits that he has no economics literature to offer the Court to support his viewpoint on the survey methodology or his opinion that an evaluation of the feasibility, efficacy, and collateral impacts of the solution presented to respondents is necessary for a CV survey. (*Id.* at 62:7-10, 66:5-68:15.)

2. Dr. Connolly Admits He Is Not an Expert in Contingent Valuation

Relatedly, Dr. Connolly admits: “I’m not an expert on contingent valuation, and I’m not

² The notion that only common sense is necessary to opine on the validity of the complex economic and survey principles underlying the CV Study and damages estimate is, of course, absurd, but even if it were true, then expert testimony would not be necessary, and Dr. Connolly’s proposed testimony should be excluded on that ground. *See, e.g., United States v. McDonald*, 933 F.2d 1519, 1522 (10th Cir. 1991); *Tilton v. Capital Cities/ABC*, 938 F. Supp. 751, 753 (N.D. Okla. 1995) (“courts have excluded expert testimony under Rule 702 on matters within the common knowledge of jurors”); *Morris v. Goodyear Tire & Rubber Co.*, No. CIV-03-655-C, 2004 U.S. Dist. LEXIS 30824, at *5 (W.D. Okla. Dec. 17, 2004) (“opinions . . . that amount to nothing more than what the admitting party’s attorney could present in closing arguments are not considered helpful and will be excluded”).

claiming to be one.”³ (Ex. E, Connolly 5/12/09 Depo Tr. at 188:4-5; *see also id.* at 203:13-14 (“I’m not a CV expert . . . I’m not representing myself as one.”), 228:22-23 (“I’m not representing myself as a CV expert”), 239:21-240:1 (expressing same), 265:11-15 (expressing same).) Dr. Connolly has never been a member of a team that conducted a contingent valuation survey or evaluated its results. (*Id.* at 7:14-16, 10:3-18.) He did not study the economics associated with willingness-to-pay or contingent valuation in order to prepare himself for reaching the opinions set forth in the Connolly Report. (*Id.* at 14:13-16.) Nor did he review the NOAA guidelines concerning contingent valuation, and he could not say that he had ever studied such guidelines. (*Id.* at 16:7-13.)

Dr. Connolly admits not knowing whether the CV Study sought to measure total value for the injury in the IRW or just a subset of total value. (*Id.* at 188:8-21.) Moreover, when Dr. Connolly was asked during deposition whether he had any authority that indicates that a CV survey will not provide reliable information concerning willingness to pay unless it contains the information he suggests in his Report (at the top of page 15), defense counsel objected on the basis that “[h]e said he’s not a survey expert.” (*Id.* at 207:19-25.) Dr. Connolly admits that he has never studied any published literature on surveys or willingness to pay that calls into question the methodology. (*Id.* at 208:4-8.)

Dr. Connolly does not know how economists or surveyors determine whether respondents find a CV scenario plausible. (*Id.* at 17:23-18:7.) Nor does he know, on the basis of contingent valuation studies, how the plausibility of a CV scenario to survey respondents affects their willingness to pay responses. (*Id.* at 19:12-17.) Dr. Connolly does not know whether there

³ Even defense counsel acknowledged this during Dr. Connolly’s deposition: “He’s already said over and over again that he’s not a CV expert.” (Ex. E, Connolly 5/12/09 Depo Tr. at 203:9-10.)

is an objective standard as to what a respondent's level of understanding should be for a design of a survey. (*Id.* at 19:18-20:2.) Further, he does not know to what degree the respondents to the CV Survey found the alum scenario plausible. (*Id.* at 19:8-11.)

Despite opining in the Connolly Report that “*without scientific evidence that the forty-year claim is valid, the entire Survey results are meaningless*,” (Ex. A, p. 14), when asked what education or experience he had in survey design or economics to allow him to render an opinion on the importance of having a scientific basis for a hypothetical restoration program in a contingent valuation survey to determine willingness to pay, he could not identify any. (Ex. E, Connolly 5/12/09 Depo Tr. at 50:7-51:12, 206:7-20.) Admitting that he has no education, training or experience in the economic concept of willingness to pay, Dr. Connolly volunteered: “[N]or am I representing myself as an expert in that area.” (*See id.* at 182:14-183:13.)

Dr. Connolly's lack of expertise in contingent valuation is further evidenced by the fact that, for example, he does not know commonly used terms in the methodology, such as “counterfactual,” “revealed preference,” and “stated preference.” (*Id.* at 15:6-13, 17:15-22.) Nor does he know whether scenarios in CV surveys use solutions that are counterfactual or how often they are used. (*Id.* at 15:14-22.) Nor could he offer any examples of a contingent valuation survey that was *not* based on a hypothetical scenario. (*Id.* at 24:20-25.)

3. Dr. Connolly Admits He Is Not an Expert in Survey Methodology

Dr. Connolly also admits that he is not a survey expert. (Ex. E, Connolly 5/12/09 Depo Tr. at 208:1 (“I’m not a survey expert”); *id.* at 8:16-18 (same).) He has no education in the area of public opinion surveys and has absolutely no experience in designing, implementing, or analyzing such surveys. (*Id.* at 6:9-17, 167:7-9, 265:19-22.) Moreover, he has never studied any published literature about surveys, and he did nothing to prepare himself for the Connolly Report

in the area of studying how surveys are conducted and designed. (*Id.* at 14:1-4, 208:4-8.) When asked what education or experience in survey design he had to offer the opinion that misrepresentation of fact to survey respondents is important to the validity of a CV survey, he said “None.” (*Id.* at 20:20-21:4.)

Furthermore, neither Dr. Connolly nor his staff to his knowledge have ever been involved in any projects relating to the restoration of a lake or reservoir using aluminum sulfate or some other type of alum or aluminum product, and Dr. Connolly’s knowledge of the effectiveness of aluminum sulfate on a reservoir or lake is based solely on reviewing the work of others. (*Id.* at 39:5-13, 39:25-40:10.) Similarly, neither Dr. Connolly nor his colleagues on the project to his knowledge have ever been involved in a river or stream restoration where the concern was nutrient pollution. (*Id.* at 40:24-41:7.)

D. Dr. Coale’s Lack of Relevant Expertise

In addition, Defendants have identified Dr. Coale, a soil scientist, as a testifying expert regarding the findings in Chapters 1 and 4 of the Connolly Report. (*See* Ex. D, p. 2.) Like Dr. Connolly, however, Dr. Coale is not an expert in the areas of economics, contingent valuation, or survey methodology.⁴ Indeed, despite Defendants’ burden to establish admissibility, *see Ralston v. Smith & Nephew Richards, Inc.*, 275 F.3d 965, 970 n.4 (10th Cir. 2001), nothing in the Connolly Report, Dr. Coale’s curriculum vitae (Ex. F), or his considered materials suggests that Dr. Coale has any more education, experience, or expertise in economics, contingent valuation,

⁴ Dr. Connolly testified that he has no understanding of whether Dr. Coale or Dr. Sullivan has any education or professional expertise in the areas of (1) economics, (2) contingent valuation, or (3) public opinion survey design and implementation. (Ex. E, Connolly 5/12/09 Depo Tr. at 8:19-10:2, 10:19-11:1.)

or survey methodology than Dr. Connolly.⁵ In fact, Dr. Coale demonstrates his fundamental lack of understanding the CV Study by discussing in Chapter 4 the “collateral” impact of costs to farmers that would result from the survey’s alum program, despite the fact that the program is hypothetical. (*See* Ex. A, p. 24.)

E. Dr. Sullivan’s Lack of Relevant Expertise

Although their co-author, Dr. Sullivan, was not identified as a testifying expert regarding the Connolly Report, like Drs. Connolly and Coale, he is not an expert in the areas of economics, contingent valuation, or survey methodology. Again, despite their burden to establish admissibility, *see Ralston*, 275 F.3d at 970 n.4, Defendants have provided nothing in the Connolly Report, Dr. Sullivan’s curriculum vitae (Ex. J), and his considered materials to suggest that Dr. Sullivan has any more education, experience, or expertise in economics, contingent valuation, or survey methodology than Drs. Connolly and Coale. *See also supra* note 4. Thus, he lacks relevant expertise to render the opinions set forth in the Report.

III. Legal Standard

The standard governing the admissibility of expert testimony is well-settled. Federal Rule of Evidence 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Fed. R. Evid. 702. Thus, “Fed. R. Evid. 702 imposes on the trial judge an important ‘gate-

⁵ Dr. Coale’s employment and contributions to the literature and lecture circuit have been limited to the areas of soil science, agricultural nutrient management and production. (Ex. F at 2-18.)

keeping’ function with regard to the admissibility of expert opinions.” *Ralston*, 275 F.3d at 969.

As an initial matter, the court must determine whether the expert is qualified by “knowledge, skill, experience, training, or education” to render an opinion. Fed. R. Evid. 702. “The issue with regard to expert testimony is not the qualifications of a witness in the abstract, but whether those qualifications provide a foundation for a witness to answer a specific question.” *In re Williams Sec. Litig.*, 496 F. Supp. 2d 1195, 1232 (N.D. Okla. 2007) (internal quotation marks omitted).

Next, the court must ensure that the scientific testimony being offered is “not only relevant, but reliable.” *See Daubert*, 509 U.S. at 589.⁶ “To be reliable under *Daubert*, an expert’s scientific testimony must be based on scientific knowledge” *Dodge v. Cotter Corp.*, 328 F.3d 1212, 1222 (10th Cir. 2003). The Supreme Court has explained that the term “scientific” “implies a grounding in the methods and procedures of science.” *Daubert*, 509 U.S. at 590. Likewise, it has explained that the term “knowledge” “connotes more than subjective belief or unsupported speculation.” *Id.* Thus, “in order to qualify as ‘scientific knowledge,’ an inference or assertion must be derived by the scientific method. Proposed testimony must be supported by appropriate validation – i.e., ‘good grounds,’ based on what is known.” *Id.*

The Supreme Court has set forth four non-exclusive factors that a court may consider in making its reliability determination: (1) whether the theory or technique can be (and has been) tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error and the existence and maintenance of standards controlling the technique’s operation; and (4) whether the theory or technique has general

⁶ The Supreme Court held in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), that the gatekeeping function set out in *Daubert* applies not only to expert testimony based on scientific knowledge, but also expert testimony based upon technical or other specialized knowledge (i.e., it applies to all expert testimony).

acceptance in the scientific community. *Id.* at 593-94. The inquiry is “a flexible one.” *Id.* at 594; *see also id.* at 593 (“[m]any factors will bear on the inquiry, and we do not presume to set out a definitive checklist or test”); *Dodge*, 328 F.3d at 1222 (“the list is not exclusive”). “The focus [of the inquiry]. . . must be solely on principles and methodologies, not on the conclusions that they generate.” *Daubert*, 509 U.S. at 595.

To be relevant, the testimony must “assist the trier of fact to understand the evidence or to determine a fact in issue.” Fed. R. Evid. 702. This consideration has been described as one of “fit.” *See Daubert*, 509 U.S. at 591. “Under Rule 702, the inquiry of whether expert testimony will assist the trier of fact is essentially a question of relevance.” *United States v. Arney*, 248 F.3d 984, 990 (10th Cir. 2001) (internal quotation marks omitted); *Smith v. Sears Roebuck & Co.*, No. CIV-04-1271-HE, 2006 WL 687151, at *3 (W.D. Okla. Mar. 17, 2006) (“the *Daubert* standard reflected in Rule 702 requires that proffered evidence be both ‘reliable’ and ‘relevant’”). The district court “has wide discretion in making these determinations.” *Arney*, 248 F.3d at 990 (internal quotation marks omitted).

It is appropriate for courts to exclude proposed expert testimony for lack of relevance. *See, e.g., Smith*, 2006 WL 687151, at *5 (excluding expert testimony in part on relevancy grounds); *Arney*, 248 F.3d at 991 (affirming district court’s exclusion of expert testimony on relevancy grounds); *Phillips v. Hillcrest Med. Ctr.*, 244 F.3d 790, 800-801 (10th Cir. 2001) (same). This is true when such proposed testimony is based on a false premise of critical assumptions. *See, e.g., Magoffe v. JLG Indus., Inc.*, No. CIV 06-0973, 2008 WL 2967653, at *18 (D.N.M. May 7, 2008) (excluding report as irrelevant because it was based on false assumption); Fed. R. Evid. 402.

In sum, “[t]he objective of [the gatekeeping] requirement is to ensure the reliability and

relevancy of expert testimony. It is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.” *Kumho Tire*, 526 U.S. at 152.

Finally, the party proffering the expert testimony bears the burden of establishing its admissibility under the Federal Rules of Evidence and *Daubert*. *Ralston*, 275 F.3d at 970 n.4.

IV. Argument

A. **Dr. Connolly’s Testimony Should Be Excluded Because He Is Unqualified and Lacks the Requisite Knowledge To Testify as an Expert with Regard To the CV Report.**

As a threshold question, before the Court examines whether an expert’s opinion is relevant and reliable, it must first determine whether that expert is qualified, through education and experience, to offer the opinions he intends to present. Fed. R. Evid. 702; *Ralston*, 275 F.3d at 969. Dr. Connolly is not so qualified.

As the parties proffering Dr. Connolly’s expert testimony, Defendants must demonstrate that Dr. Connolly possesses qualifications that are

specific to the matters he proposes to address as an expert. . . . Thus, on the issue of expert qualifications, *Ralston* and like cases establish that the qualifications of the proposed expert are to be assessed only after the specific matters he proposes to address have been identified. The controlling Tenth Circuit cases, exemplified by *Ralston*, establish that the expert’s qualifications must be both (i) adequate in a general, qualitative sense (i.e., ‘knowledge, skill, experience, training or education’ as required by Rule 702) and (ii) specific to the matters he proposes to address as an expert.

In re Williams Sec. Litig., 496 F. Supp. 2d at 1232. Defendants cannot satisfy their burden.

Peppered throughout Chapters 1 through 3 of the Connolly Report, for which Dr. Connolly has been proffered as a testifying expert, are purported findings that the CV Survey and resulting damages estimate are invalid. (*See, e.g.*, Ex. A, Ch. 1, p. 2 (“Because the respondents

were given inaccurate and faulty information about the status of the Illinois River Watershed and to Lake Tenkiller, the Survey is not valid and its CV estimate is therefore meaningless.”); *id.*, Ch. 2, p. 11 (“Because the Survey results are based on inaccurate statements regarding the current state of ecological conditions in the Illinois River Watershed, the results of that survey that pertain to willingness-to-pay are invalid.”); *id.*, Ch. 3, p. 18 (“Because Survey respondents were not informed regarding the possibility of biological damage associated with alum application to the lake and river, their responses with respect to willingness-to-pay are invalid.”).) Dr. Connolly further opines throughout Chapters 2 and 3 on what information “should have been” presented to respondents about the baseline condition, the use of photographs in setting baseline information in surveys, the presentation of specific information as certain in a CV survey, the role of allocating among potential contributors in a CV survey, and the appropriate level of specificity of information presented in a CV survey. These opinions are well outside Dr. Connolly’s area of expertise.

As demonstrated in Section II.C above, Dr. Connolly lacks qualifications to render opinions on the economic and survey methodological issues he proposes to address as an expert. Indeed, like the proposed expert excluded in *Ralston*,⁷ Dr. Connolly readily admits that he is not an economist, is not an expert in contingent valuation, and is not an expert in survey methodology. Throughout his deposition testimony, cited at length in Section II.C, he conceded several times that he knew virtually nothing about survey design and implementation, economics, the contingent valuation methodology, or the economic principle of willingness to pay. He admits doing no research and having no education, training, or experience in any of these areas and readily admits that he is not an expert in those fields. Dr. Connolly’s lack of

⁷ In *Ralston*, the Tenth Circuit affirmed the exclusion of a board-certified orthopedic surgeon proffered to criticize warnings accompanying an orthopedic nail. 275 F.3d at 969-70.

relevant expertise is reflected in his lack of understanding of key principles in economics and survey methodology that provide a sound foundation for a CV study (e.g., presenting a counterfactual scenario, respondents making decisions with incomplete information, etc.), principles that underlie his criticisms of the study. *See supra* Section II.C.

Although Dr. Connolly may have knowledge and experience in engineering, the opinions rendered in the Connolly Report addressing (1) the CV survey designed and implemented by the Stratus team and (2) the Stratus team's expert findings based on economic analysis of the survey results as set forth in the CV Report are *not* "within the reasonable confines of his subject area." *Ralston*, 275 F.3d at 970 ("merely possessing a medical degree is not sufficient to permit a physician to testify concerning any medical-related issue"); *Alexander v. Smith & Nephew*, 98 F. Supp. 2d 1310, 1315 (N.D. Okla. 2000). As demonstrated by Dr. Connolly's own admissions, he simply has no expertise to opine on the topics contained in the CV Report, making his lack of relevant expertise even more extreme than in *Ralston*. Accordingly, Dr. Connolly's testimony is inadmissible under Rule 702 and *Daubert*.

B. Similarly, Dr. Coale's Testimony Should Be Excluded Because He Is Unqualified and Lacks the Requisite Knowledge To Testify as an Expert with Regard To the CV Report.

Similarly, Dr. Coale is not qualified to render opinions on Chapters 1 and 4 of the Connolly Report. Accordingly, his testimony should be precluded with regard to opining on the validity of the CV survey or the resulting analysis by the Stratus team.

As before, the qualifications of the proposed expert are to be assessed only after the specific matters he proposes to address have been identified. In this regard, Defendants have identified Dr. Coale as a testifying expert on Chapters 1 and 4 of the Connolly Report. Other than providing introductory information about the CV Survey and CV Report, Chapter 1 summarizes the findings of the Report without any analysis. (Ex. A, pp. 2-3.) In Chapter 4, Dr.

Coale first analyzes “factors to consider when assessing the efficacy of applying alum to soils for the purpose of reducing phosphorus transport from grass pastures to surface water bodies” (*id.*, p. 24), and then opines on what information regarding alum the respondents “should have been presented” (*id.*, p. 26). Dr. Coale then concludes: “Because the solution proposed by Stratus to the survey respondents was based on a chemical treatment that was not proven, was in need of additional investigation, and was potentially costly to landowners and counterproductive to pasture productivity and farm profitability, the results of the survey with respect to willingness-to-pay are invalid.” (*Id.*, pp. 26-27.) He also finds that “the potential negative effects of such an alum treatment of pasture lands, including soil acidification and potentially an increased mitigation costs to farmers, were not evaluated or communicated to survey respondents. Therefore, *survey results based on such a ‘solution’ are invalid.*” (*Id.*, p. 28 [emphasis added].)

While Dr. Coale may have knowledge in soil science and nutrient management, he has no expertise in relevant economics, contingent valuation, or survey methodology to support his opinions regarding the validity of the CV Study. *See supra* Section II.D. Thus, his proposed testimony relating to the CV survey, what respondents “should have been told,” and the Stratus team’s analysis of the survey results, is inadmissible under Rule 702 and *Daubert*. It should be precluded.

C. Chapter 2.1 Through 2.4 and Related Testimony Should Be Excluded as Untimely and/or Cumulative.

The opinions set forth in Chapter 2.1 through 2.4 of the Connolly Report and related testimony should be excluded as untimely and/or cumulative.

First, in Chapter 2.1 through 2.4, other than opining on the validity of the CV Study – for which they have no expertise as discussed above – the authors: (1) opine on environmental conditions in the IRW, namely, changes that have occurred in the IRW since the 1960s such as

increased human population, deforestation and urbanization (Ex. A, p. 6); and (2) opine on conclusions drawn by the State's *injury* experts, including Drs. Cooke, Welch, Stevenson, Fisher, Olson, Wells, and Engel (*id.*, pp. 8-9, 11-13). Opinions within these categories were due no later than January 30, 2009 under the Court's November 21, 2008 Order. (Dkt. #1805.) Thus, Chapter 2.1 through 2.4 and any related testimony should be stricken as untimely.

Second, in these subchapters, the authors rehash opinions rendered by *Defendants'* own *injury* experts, repeatedly citing their own prior reports (i.e., those of Drs. Connolly and Sullivan), as well as those of Defendants' experts Drs. Jarman and Bierman. (Ex. A, pp. 7, 9-12.) Such rehashed opinions should be excluded as cumulative. *See* Fed. R. Evid. 403 (excluding "needless presentation of cumulative evidence"); *Hendrix v. Evenflo Co.*, 255 F.R.D. 568, 579 (N.D. Fla. 2009) (exclusion under Rule 403 appropriate where testimony is cumulative). Courts generally exclude expert testimony that parrots the testimony of other experts on the grounds that it is unnecessarily duplicative. *E.g.*, *Thorndike v. Daimler-Chrysler Corp.*, 266 F. Supp. 2d 172, 185-86 (D. Me. 2003) (excluding "unnecessarily duplicative" opinions in "territories already occupied by other [defense] experts").

In sum, to the extent the Connolly Report sets forth any newly rendered opinions on the injury in the IRW, such opinions must be excluded as untimely. To the extent the report rehashes injury-related opinions previously rendered by the authors of the Connolly Report or other Defendants' experts, as identified above, such opinions must be excluded as cumulative. Whether the CV survey accurately describes the injury is an issue for the trier of fact, upon consideration of the testimony of the parties' competing experts regarding injury to the IRW. To permit Defendants' collateral, rehashed attack on the State's expert reports on injury, by way of the Connolly Report's criticisms of the CV survey's description of the injury, is not warranted,

and such opinions should be excluded.

D. Chapters 2.5, 3, and 4 of the Connolly Report and Related Testimony Should Be Excluded as Irrelevant.

Chapters 2.5, 3, and 4 of the Connolly Report set forth findings challenging the validity of the CV Survey and the results thereof based on the survey's use of a hypothetical alum program described above in Section II.A. (Ex. A, pp. 13-28.) Specifically, Chapter 2.5 claims that "no scientific basis is given in [the CV Report] for this 40-year acceleration" in the recovery of the river and lake due to the alum program described in the CV survey and that "[w]ithout scientific evidence that the 40-year claim is valid, the entire Survey results are meaningless." (*Id.*, pp. 13, 14.) Relatedly, Chapter 3 challenges the CV Survey based on the following premise: "The Stratus Survey did not consider or present the practicality, efficacy, and collateral impacts of its hypothetical remedial strategy and therefore provided the Survey respondents with an inaccurate and incomplete picture." (*Id.*, p. 15.) Chapter 4 is effectively based on the same premise. (*Id.*, pp. 24-28.) This is a false premise, however, because such factors are not relevant to the validity of the CV survey, the survey responses, or the resulting analysis. Accordingly, the discussion of these factors in the Connolly Report, and the findings of its authors (none of whom is an environmental economist or survey methodologist) regarding what "survey respondents should have been told" (e.g., *id.*, p. 23) and the validity of the survey, must be stricken under Fed. R. Evid. 702 and *Daubert*. (Ex. A, pp. 13-28.)

As an initial matter, it is surprising that Defendants have not withdrawn the Connolly Report, particularly after the Court's May 7, 2009 Order denying Defendants' motion to strike "any and all results, opinions, and conclusions based on representations or assumptions about proposals for alum treatments" in the CV Report. (Dkt. #2023, pp. 1, 3.) Confirming that Oklahoma had made clear that the CV Report authors "are not opining as to the efficacy of alum

treatments as a remedial action” (*id.*, p. 2.), the Court went on to state that “[t]he pertinent inquiry then is not whether there is a timely, Rule 26-sufficient expert opinion supporting the efficacy of alum treatment as a remedial measure but whether this ‘outcome’ is an appropriate mechanism to use as a valuation measure” (*id.*, p. 3). Drs. Connolly and Coale have no expertise to opine on this point, and the portions of the Connolly Report relating to the alum scenario should have been withdrawn, especially after the Court’s Order.

In any event, the Connolly Report improperly assumes – without any basis as a matter of survey methodology or economics – that the validity of the CV survey, the responses thereto, and the resulting analysis is dependent upon “the practicality, efficacy, and collateral impacts” of the alum treatment scenario presented to the survey respondents. (Ex. A, p. 15.) In Chapter 3, Dr. Connolly identifies the following questions that he claims should have been considered and presented to the CV survey respondents:

1. Will alum treatment substantively reduce phosphorus load to Lake Tenkiller given the current understanding of the watershed?
2. Will alum treatment substantially reduce the concentration of phosphorus in Lake Tenkiller, and will that reduction in phosphorus concentration substantially change the biological conditions of the lake?
3. Can this treatment be adequately implemented?
4. What collateral impacts could be associated with alum treatment across a million acre watershed, the Illinois River, and Lake Tenkiller?

(*Id.*) Dr. Connolly proceeds to analyze those questions based on a technical evaluation of the efficacy of alum treatments in Chapter 3 and, despite his lack of survey and economics expertise, makes a giant analytical leap to describe what the Survey “should have” informed the respondents of (e.g., *id.*, pp. 22-23) and to “find” that the Survey “responses with respect to willingness-to-pay are invalid” (*id.*, p. 18). Similarly, in Chapter 4, Dr. Coale discusses the “factors to consider when assessing the efficacy of applying alum to soils” (*id.*, p. 24) and then

complains that “[r]espondents were not given an accurate description of potential adverse impacts” (*id.*, p. 25). Dr. Coale concludes that “the potential negative effects of such an alum treatment of pasture lands, including soil acidification and potentially an increased mitigation costs to farms, were not evaluated or communicated to survey respondents. Therefore, survey results based on such a ‘solution’ are invalid.” (*Id.*, p. 28.)

Chapters 2.5, 3, and 4 demonstrate that Dr. Connolly’s and Dr. Coale’s lack of training and understanding of economics and CV cause them entirely to miss the point of the alum scenario in the CV survey. First, the CV Report does not evaluate an alum program nor does it attempt to set forth expert findings as to “the practicality, efficacy, and collateral impacts” of the alum program as a matter of the natural sciences. (*See* Ex. B, Hanemann Decl. ¶ 10 (“The alum scenario set forth in the CV study is *not* being used to design a restoration program for the Illinois River System and Tenkiller Lake.” [emphasis in original])).) Indeed, the CV Report expressly states: “While the State is not actually proposing this specific alum treatment program at this time, the choice was posed to the respondent as an actual choice.” (Dkt. #1853-5, p. 1-7.) Moreover, in the Court’s May 10, 2009 Order denying Defendants’ motion to strike portions of the CV Report based on the alum program, Judge Cleary stated: “As Oklahoma makes clear . . . [the CV Report authors] are not opining as to the efficacy of alum treatments as a remedial action as they have no expertise in this area; rather the ‘alum scenario’ is used in the contingent valuation survey as a ‘plausible’ means to elicit survey respondents’ ‘truthful valuations of the scenario *outcome*, namely and accelerated reduction in future natural resource injuries to the Illinois River System and Tenkiller Lake.’” (Dkt. #2023 (citations omitted) (emphasis in original).) Thus, the Connolly Report’s critique of “the practicality, efficacy, and collateral impacts” of the alum scenario is an unnecessary, unhelpful distraction to the trier of fact.

Second, the CV Study used alum treatment as a mechanism within the CV framework “to create a tradeoff for survey respondents in order to elicit their truthful valuations of the scenario *outcome*, namely an accelerated reduction in future natural resource injuries to the Illinois River System and Tenkiller Lake.” (Ex. B, Hanemann Decl. ¶ 10 [emphasis in original].) “The validity of the respondents’ answers depends only on whether *they* found the alum treatments to be a plausible method for speeding up the recovery of the river and lake, not on whether such treatments would actually be carried out or would be effective if they were carried out.” (Ex. C, Tourangeau Decl. ¶ 7.) As described in the CV Report, “[t]he presentation of the alum treatment program allowed respondents to make a choice about a well-defined, realistic tradeoff. Either they could greatly reduce the injury and pay the tax for the alum treatments or accept the natural recovery without the alum treatment and use their money for other purposes.” (Dkt. #1853-5, CV Report, p. 1-7.) Accordingly, “the practicality, efficacy, and collateral impacts” of the alum program (Ex. A, p. 15) are not relevant to the validity of the CV Study.

Attached hereto in support of this Motion are Declarations of Dr. Michael Hanemann,⁸ one of the State’s economic experts, and Dr. Roger Tourangeau,⁹ one of the State’s experts in survey methodology. (Exs. B and C.) These Declarations directly undercut the false premise

⁸ Dr. Hanemann is a Chancellor’s Professor in the Department of Agricultural & Resource Economics and the Goldman School of Public Policy at the University of California, Berkeley. (Ex. B, Hanemann Decl. ¶ 1.) He received his Ph.D. from Harvard University and has 35 years of experience in the fields of environmental economics, welfare economics, and non-market valuation, including using surveys and stated and revealed preference methods to measure economic value. (*Id.* ¶ 2.) Dr. Hanemann’s curriculum vitae is attached hereto as Exhibit K.

⁹ Dr. Tourangeau is a Research Professor with the Survey Research Center at the University of Michigan, as well as a Research Professor for the Joint Program in Survey Methodology at the University of Maryland. (Ex. C, Tourangeau Decl. ¶ 1.) He received his Ph.D. from Yale University in Psychology and has nearly 30 years of experience in the field of research science, including survey methodology and research analysis. (*Id.* ¶ 2.) Dr. Tourangeau’s curriculum vitae is attached hereto as Exhibit L.

underlying the Connolly Report, namely, that the “practicality, efficacy, and collateral impacts” of the alum program are relevant to the validity of the survey and the results thereof.

Dr. Hanemann’s Declaration provides in part:

- “The survey set forth in the CV Report measures what individuals would be willing to pay for a program to accelerate future improvements in public trust resources in the Illinois River System and Tenkiller Lake. To do this it presents a scenario in which the injuries in the Illinois River system and Tenkiller Lake could be reduced more quickly through a particular program using alum. This creates the tradeoff that serves to measure the Oklahoma public’s monetary value for accelerating the reduction in future natural resource injuries. It is important that respondents find this tradeoff plausible and take it seriously.” (Ex. B, ¶ 9.)
- “The alum scenario set forth in the CV study is *not* being used to design a restoration program for the Illinois River System and Tenkiller Lake; it is being used to create a tradeoff for survey respondents in order to elicit their truthful valuations of the scenario *outcome*, namely an accelerated reduction in future natural resource injuries to the Illinois River System and Tenkiller Lake.” (*Id.* ¶ 10 [emphasis in original].)
- “Accordingly, the practicality, efficacy, and any collateral impacts of the alum scenario are irrelevant to the validity of the survey, the survey responses, and the resulting analysis. The key to the survey is that respondents accept that the outcome can be secured at a given cost to themselves. It is immaterial to the validity of the results whether the mechanism generating the outcome is fictitious as long as it is accepted by respondents.” (*Id.* ¶ 11.)
- “The use of a tradeoff based on a scenario which is seen by respondents as plausible, while actually containing factual inaccuracies, is a well accepted practice in stated preference analysis, including contingent valuation and choice experiments. It is a well-established and accepted method for achieving valid and reliable measurements of value. In many *ex ante* analyses of government programs, the means of accomplishing and delivering a program is not known at the time, and analyses of the public’s preferences proceed with an assumed scenario that people find plausible and respond truthfully to.” (*Id.* ¶ 12.)

Dr. Tourangeau’s Declaration provides in part:

- “In social science research, particularly social psychology, it is a well-established, standard and common practice that information be withheld from the study participants or that information that is not factually correct be provided to them. The acceptability of this practice is discussed at length in the social science literature.” (Ex. C, Tourangeau Decl. ¶ 5.)
- “It is often necessary in social science studies generally, and in contingent

valuation studies more specifically, that information be withheld from participants or that information that is not factually correct be presented to them so that the participants take the information in the intended way and take their task seriously.” (*Id.* ¶ 6.)

- “In the context of the contingent valuation survey that was conducted for this case, the survey was designed to measure what respondents were willing to pay for speeding up the recovery of the Illinois River and Tenkiller Lake. The alum treatments described in the survey were merely a vehicle for measuring the respondents’ willingness to pay. The validity of the respondents’ answers depends only on whether *they* found the alum treatments to be a plausible method for speeding up the recovery of the river and lake, not on whether such treatments would actually be carried out or would be effective if they were carried out.” (*Id.* ¶ 7 [emphasis in original].)
- “In the survey discussed in the CV Report, it is evident from the survey results that a large majority of the respondents understood and accepted the accelerated cleanup scenario and believed their choices were consequential. Thus, regardless of whether the State ultimately implements an alum program and whether an alum program would be practical, effective, or have collateral impacts, the results of the survey are valid and reliable.” (*Id.* ¶ 8.)
- “The use of the hypothetical alum scenario in the contingent valuation survey was necessary and appropriate under the standard methodology used in contingent valuation surveys, and under the standards of social science research more generally, and the results of the contingent valuation survey are valid and reliable. The use of a hypothetical scenario in no way renders the results of the study invalid or unreliable.” (*Id.* ¶ 9.)

The deposition testimony of various authors of the CV Report (e.g., Mr. David Chapman, project manager for the CV Study, and the State’s experts in survey methodology, Dr. Tourangeau and Dr. Krosnick) further supports the fact that the practicality, efficacy, and collateral impacts of the alum scenario are irrelevant to the validity of the survey.

For example, Mr. Chapman testified at deposition as follows:

- Q: Did the team reach a conclusion about whether or not the alum treatments would return the water to the clarity that’s described in your survey?
- A: No, we reached a conclusion that presenting this information to the respondents at this time in the survey helped us measure what we were trying to measure, which is the individual’s willingness to pay to undo the problem.

Q: So even if it was simply false, that adding alum, doing these alum treatments – strike that. Even if doing this alum program that you’ve described wouldn’t return the water to the clarity levels of 1960, it wouldn’t make any difference to the outcome of your survey?

MS. XIDIS: Objection to form.

A: There were multiple questions in there. I’m trying to figure out which ones to answer. Please –

(Whereupon, the court reporter read back the previous question.)

A: What matters is what the respondents understood and did the respondents understand that the water clarity could be returned. If the respondents, which we think we did a very good job in describing the situation, describing a fix and understanding how they reacted to that fix, as long as the respondents took this as being a plausible scenario to return the water clarity back to the conditions they cared about, then whether or not it was actually a program that could be actually implemented in this time frame wouldn’t change those results.

(Ex. G, Chapman 4/6/09 Depo Tr. at 145:19-147:6.)

Dr. Tourangeau testified at deposition that “[w]hat was critical to us was to present a solution to people that was plausible, that they could understand and that they accepted, and we presented a solution involving alum and other steps the State would take, might take to restore the river and lake to 1960 conditions, and in order to obtain the information we needed, we presented the scenario.” (Ex. H, Tourangeau 4/8/09 Depo Tr. at 57:1-8.) Dr. Tourangeau added that: “What was important to us about the alum program was that people thought it would solve the problem, that they understood it and they accepted it.”¹⁰ (*Id.* at 128:4-6.)

¹⁰ The specific exchange, which began with the false premise that the State’s restoration expert had not evaluated alum, went as follows:

Q: You presented the alum restoration program as something that would work, that the State was considering doing in order to solve this problem. Do you think it would have been important to the recipients to know that the State’s restoration expert had not even evaluated it?

MS. XIDIS: Objection to form.

Dr. Jon Krosnick, one of the State's experts on survey methodology and author of the CV Report, testified at deposition as follows:

Q: Did you also attempt to make sure that your description of the solution, in this case the alum treatment, was consistent with what the natural science evidence provided?

MS. MOLL: Objection to form.

A: No.

Q: Why not?

A: So the purpose of the contingent valuation survey was to accurately describe to people a set of what are technically called injuries to the environment and then to propose a plausible solution to those problems, and plausible in the minds of the respondents, and so our goal was for the respondents to understand the plausible solution and to understand that it could work, and at that point having described that, we asked them to vote on whether they would favor or oppose implementing that particular plan, but we – the long history of contingent valuation has established this method as one where values can be generated as long as that solution is plausible and understandable to respondents, even if the solution is not one that can actually be accomplished or would be effective. So in other words, if we propose a solution today, respondents value it, the good that would be provided by that solution plan, and then later we learn that the solution plan wouldn't actually work, that does not invalidate the measurement of values made with it. Now, of course, if we learn later that the solution plan can work, that doesn't enhance anything either in changing the validity of the value of measurement.

(Ex. I, Krosnick 5/1/09 Depo Tr. at 112:9-113:15.)

Against this backdrop are the opinions of Dr. Connolly and Dr. Coale, who have no education or expertise in economics, contingent valuation, or survey methodology, yet who opine on the validity of the CV Study and damages estimate. Because such findings are based on

A: I think we've been over this a lot of times. What was important to us about the alum program was that people thought it would solve the problem, that they understood it and they accepted it. The State – who was it – evaluation expert's view of it, I don't see it as relevant.

(Ex. H, Tourangeau 4/8/09 Depo Tr. at 127:21-128:8.)

the false premise of the practicality, efficacy, and collateral impacts of an alum program, which are irrelevant to the CV Study, their opinions are inadmissible.

In sum, whether the State actually implements an alum treatment program and whether such program would be effective, implementable, and cost-effective are considerations that are irrelevant to the validity of the CV Study and resulting CV Report, as reflected in the accompanying Declarations of Drs. Hanemann and Tourangeau, and the deposition testimony of the CV Report authors quoted above. The findings in the Connolly Report are, therefore, of no assistance to the trier of fact. *See, e.g., Gust v. Jones*, 162 F.3d 587, 594 (10th Cir. 1998) (“the touchstone of the admissibility of expert testimony is its helpfulness to the trier of fact” [internal quotation marks omitted]). Accordingly, the Connolly Report and related testimony are inadmissible under Rule 702 and *Daubert* and should be excluded for lack of relevance.

V. Conclusion

In the Connolly Report, Defendants’ proffered testifying experts, Dr. Connolly and Dr. Coale, opine in areas outside their expertise in this case. Their lack of education, training, and experience in economics, contingent valuation, and survey methodology requires that their testimony regarding the CV Study be precluded. Moreover, even if Drs. Connolly and Coale were otherwise qualified to render the opinions set forth in the Connolly Report, such opinions are either untimely or irrelevant to the validity of the CV Study.

WHEREFORE, this Court should enter an order *in limine* (1) precluding the expert testimony of Defendants’ witnesses Dr. John Connolly and Dr. Frank Coale due to their lack of expertise pertaining to the subject matter on which they intend to opine and (2) excluding the March 2009 Expert Report entitled “Evaluation of Hypothetical Remediation Strategy Presented in Stratus Contingent Value Study Illinois River Watershed” by Connolly et al.

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